No. 84-1907

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and
BARBARA F. CLISBY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

INTRODUCTORY STATEMENT

Kaiser has requested this Court to decide whether a violation of Section 2 of the Sherman Act can be based on a "price squeeze" theory when the defendant lacks monopoly power over the raw material or "upstream" product. In his Brief for the United States as Amicus Curiae ("Solicitor General's Brief"), the Solicitor General agrees that the Court of Appeals below erred in concluding that evidence of "price leadership" by Kaiser could properly be substituted for monopoly power as a basis for Section 2 liability.

Notwithstanding his extensive and compelling discussion of the errors in the Court of Appeals' decision, however, the Solicitor General is "unable to conclude that review by this Court is warranted in this case." (Solicitor General's Brief at 16.) The Solicitor General supports this position (a) by speculating that price squeeze cases are likely to be relatively rare and unlikely to be affected by the Third Circuit's decision because the defects of that decision are "obvious" (*id.* at 17) and (b) by noting that there was other evidence in the case—which the Solicitor General views as indicative of "no more than aggressive competition" (*id.* at 17-18)—that was considered by the jury and that the Court of Appeals might have regarded as sufficient grounds for upholding the judgment below.

For the reasons discussed below, the reasoning of the Solicitor General provides an insufficient basis for concluding that the clearly erroneous decision below should stand. This Court has already granted certiorari in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 106 S. Ct. 1629 (1986) (No. 85-473), which involves a similar "price squeeze" theory, and it should grant review here to insure that this theory of antitrust violation is brought

into conformity with the Court's other recent economically-sound and competition-based antitrust decisions.

DISCUSSION

I. The Solicitor General Properly Concluded That The Court of Appeals Erred In Predicating Its "Price Squeeze" Decision On Evidence Of "Price Leadership."

The discussion in the Solicitor General's Brief of the economic and antitrust significance of "price squeezes" presents a well-reasoned framework for considering the issues presented by Kaiser's petition, and Kaiser endorses that discussion. As the Solicitor General notes, the leading case involving the theory of price squeeze under the antitrust laws is *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). That case, decided by the Second Circuit because there was no quorum of this Court available to consider the Government's appeal, includes a holding that having monopolized the aluminum ingot market, Alcoa was obligated to set a "fair price" for ingot so that downstream fabricators could make a living profit. As the Solicitor General further notes, this portion of the *Alcoa* decision has been widely criticized as "fundamentally inconsistent" with the "basic principle of modern-day antitrust analysis" that "the antitrust laws 'were enacted for the protection of *competition* not *competitors.*'" (Solicitor General's Brief at 11) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis by the Court)).

The Solicitor General's Brief is also correct in emphasizing that whatever one might conclude about an *Alcoa*-type price squeeze, "proof that the defendant possessed power over price in the raw material or 'upstream' market is an indispensable element in establishing that the defendant engaged in a price squeeze unlawful under Section 2." (*Id.* at 13.) It is the absence of such proof in this case on which Kaiser's petition for certiorari has focused. Whether the Court of Appeals' opinion is read as dispensing with the requirement of monopoly power

over price or simply incorrectly finding evidence of such power in plaintiff's claim of price leadership is irrelevant.[1]

In either case, the Third Circuit's substitution of price leadership for monopoly power has substantially expanded the price squeeze theory of the *Alcoa* case. Price leadership is usually viewed as a mechanism by which one seller's price changes are followed by others to the mutual benefit of all.[2] As the Solicitor General points out, however, a theory hypothesizing the use of price leadership to set a high new material price that benefits the price leader but causes its competitors to lose sales and profits is implausible. Price leadership is therefore an inadequate substitute for monopoly power in a price squeeze case unless it can be proved that the sellers of the raw material had actually agreed on the price. (Solicitor General's Brief at 15-16). Reversal of the contrary decision below is important to insure that the economically sound rules this Court has applied to other areas of the antitrust laws are applied to alleged price squeezes as well.

II. The Factors Cited By The Solicitor General As Reasons For Not Granting Certiorari To Correct The Erroneous Decision Below Cannot Withstand Analysis.

The Solicitor General has questioned both the importance of the decision below and the procedural posture

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[1] In its June 2, 1986, Supplemental Brief, Columbia has argued that certiorari is inappropriate because this Court does not take cases to consider the sufficiency of the evidence. The supposed authority for that proposition involves the very different proposition that, except in exceptional cases, this Court will not review a lower court's resolution of disputed issues of fact. As the Solicitor General's Brief makes clear, what is involved here is a legal question of the elements of a price squeeze theory under the antitrust laws, not a question of disputed issues of fact.

[2] Although some theories of oligopoly behavior suggest that such prices will tend to be above competitive levels, that is not so in the case of "barometric price leadership." *See* Kaiser's Petition for a Writ of Certiorari at 21-23.

in which the issues raised by the petition for certiorari have been presented.

On the first point, the Solicitor General's Brief engages in speculation that is both illogical and demonstrably wrong. According to the Solicitor General, the Third Circuit's acceptance of Columbia's theory of price leadership as sufficient evidence of power over price may not warrant review by this Court since "[q]uestions regarding price squeezes do not arise with any frequency under the antitrust laws because a defendant rarely possesses sufficient market power in both raw material and finished product markets to support a credible claim that it controlled prices in both markets." (Solicitor General's Brief at 16-17.) This simply misses the point. The Court of Appeals' error is important precisely because it avoids the necessity of finding genuine market power in the raw material market by relying on allegations of price leadership, which the Solicitor General recognizes as a "common phenomenon" in many industries. (*Id.* at 15; *see also* Kaiser's Petition for a Writ of Certiorari at 14-15.) If the Third Circuit's theory were accepted, market power sufficient to impose an unlawful price squeeze would be far from a rarity.

The Solicitor General also expresses doubt that other courts of appeals will adopt the reasoning of the court below because the shortcomings of price leadership evidence as proof of power over price are "obvious." In its recent decision in *Matsushita Industrial Co. v. Zenith Radio Co.*, 106 S. Ct. 1348 (1986), however, this Court stated that the harm in permitting an implausible inference of antitrust violation results not merely from the likelihood that the precedent will be followed by other courts, but from the chilling effect of such an erroneous decision on competitive conduct that the antitrust laws were intended to protect. As the Solicitor General recognizes, the alleged behavior of competing "upstream market" suppliers to effect a price squeeze from which only the price leader would benefit is thoroughly implausible.

Moreover, the decision of the court below, if allowed to stand, is likely to have a chilling effect on competition. Columbia based its claim of price leadership by Kaiser on the fact that even though Kaiser accounted for only a small share of total sales of aluminum coil and sheet,[3] it was the largest supplier of coil and sheet for use in the manufacture of aluminum culvert. (*See* Solicitor General's Brief at 7-8.) But this is likely to be the case wherever a raw material manufacturer has developed a new use for a product, as Kaiser did here. Subjecting such a manufacturer to charges of price squeeze whenever the margins of his non-integrated end product competitors narrow will plainly either deter the innovation and development of new products or require the maintenance of artificial prices in the face of changing demand or supply. In either event, the result will be to deter conduct that the antitrust laws were designed to foster.

Significantly, the Solicitor General's doubt that other courts will uphold price squeeze allegations on the basis of oligopoly pricing rather than unilateral market power is disproved by a case now pending before this Court—*Cargill, Inc. v. Monfort of Colorado, Inc.*, No. 85-473. The plaintiff's theory of injury and standing in that case was that following the merger of two of its competitors, industry margins would be narrowed and it would be subjected to a price squeeze. It has claimed that even though the merged firm would account for only about 20 percent of the relevant end product market, "where there are but a few significant firms in the industry,

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[3] Contrary to the claim made by Columbia in its Supplemental Brief that "Kaiser enjoyed over 75% of sales of aluminum coil in the relevant geographical market" (at 4 n.5), this represented only Kaiser's share of that small portion of aluminum sheet and coil that is used in aluminum culvert, including that used in its own pipe plants. In fact, Kaiser accounted for only about 15 percent of total U.S. domestic aluminum production capacity and, as the Court of Appeals recognized, "Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators . . . ." (Kaiser's Petition for a Writ of Certiorari, Appendix B at A-15.)

competitors will be aware of and react to the efforts of one another so that the action of a single substantial rival can affect overall market prices." (Brief for Respondent in No. 85-473, at 26.) Like Kaiser and the Solicitor General in this case, the defendants in *Monfort* have responded that the "market shares and other conditions sufficient to threaten oligopoly pricing cannot be equated to the single firm market power that creates a genuine risk of predation" and that "predation is a credible possibility only in market conditions different from, and far more extreme than, those that may enable firms collectively to engage in oligopoly pricing." (Brief for the Petitioners in No. 85-473, at 30-31.) And the Solicitor General has pointed out that the plaintiff in *Monfort*, in asserting its price squeeze claim, "was in essence alleging that it would be the victim not of antitrust violations but of competition." (Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners in No. 85-473, at 16.)

The history of both this case and of *Monfort* shows that in fact there is every reason to anticipate that competitors who have been "squeezed" by the narrowing of their margins will seek their profits in antitrust litigation, asserting theories of price leadership or other forms of oligopoly pricing wherever evidence of genuine market power is lacking. The likelihood that businessmen, to avoid subjecting themselves to such treble damage actions, will alter their behavior in response to the erroneous decisions that have accepted such theories is just as great in "price squeeze" cases as it was in *Matsushita*, and the chilling effect on pro-competitve conduct just as threatening.

The Solicitor General also urges that review of the Court of Appeals' erroneous price squeeze theory is not warranted because as a procedural matter the price squeeze question "appears not to have been dispositive in this case." (Solicitor General's Brief at 17.) The Solicitor General reaches this conclusion because he reads the Third Circuit's opinion to "suggest" that the court "appar-

ently viewed the evidence independent of the price squeeze as providing sufficient grounds for upholding the jury's verdict on the Section 2 claim . . . ." (*Id.*) Although the Solicitor General recognizes that this other evidence probably showed "no more than aggressive competition" (*id.* at 17-18), he suggests that reversal on this ground would be inappropriate because of doubts that the issue was presented by Kaiser's petition.

Regardless of whether it would be appropriate for this Court to reverse and remand with instructions to enter judgment in Kaiser's favor on grounds that neither the price squeeze nor the other evidence was sufficient to support a violation of Section 2,[4] there is simply no basis upon which this Court or the court below could properly uphold the present judgment by reference to the non-price squeeze evidence alone. The Solicitor General's Brief recognizes that in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), this Court found that a new trial was required where one theory of liability argued to a jury was found to be erroneous. (Solicitor General's Brief at 18-19.) It attempts to distinguish *Sunkist* from the present case, however, by asserting that "[h]ere . . . Columbia has presented only a single theory of liability—that Kaiser violated Section 2 by seeking to drive Columbia out of business—supported by a variety of evidence, including the evidence relating to the price squeeze." (*Id.* at 19.) But the holding of *Sunkist* does not turn on whether the plaintiff's case can be characterized as consisting of one or several theories.[5] There, as here, the plaintiffs claimed

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[4] Kaiser submits that this Court could take that course if it chose to examine the non-price squeeze evidence. Kaiser did not urge that result in its petition because it is customary for the court below to consider in the first instance whether the remaining evidence could possibly support the result, so that a new trial should be had, or whether—as should be the result here—judgment for the petition should be directed on remand.

[5] If characterization were required, it would be easy to conclude, as Judge Adams has already done, that Columbia presented a

that they had been the victims of a violation of the antitrust laws and presented a variety of evidence in support of that claim. 370 U.S. at 23-24. And there, as here, the plaintiffs were permitted to have all of their evidence considered together by the jury, rather than being examined in pieces to determine whether each piece of evidence, viewed in isolation, was sufficient to support a verdict for plaintiffs.[6]

This Court held in *Sunkist* that the plaintiffs were not entitled to have a verdict in their favor upheld when that verdict might have been based on evidence that could not properly support a finding of liability. As this Court pointed out, where a plaintiff's case involves the jury's consideration of various claims and conduct, the resulting verdict's "generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, *either in the admission of evidence or in the charge of the court*, the verdict cannot be upheld . . . ." 370 U.S. at 30 (emphasis added) (quoting *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884)).

This reasoning applies precisely to the facts of the present case. The district court rejected Kaiser's proposed instruction that the jury could not properly find a price squeeze on the basis of the expert testimony offered in support of the price leadership question. The possi-

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separate and distinct " 'price squeeze' theory of liability." (Kaiser's Petition for a Writ of Certiorari, Appendix A at A-4.) Indeed, the Solicitor General's Brief itself recognizes that the alleged price squeeze was quite separate from Columbia's other claims. It repeatedly characterizes the price squeeze theory as a separate claim and states that the "independent" evidence submitted to show that Kaiser had attempted to control its competition was "wholly unrelated to the price squeeze claim." (Solicitor General's Brief at 17-18.)

[6] This is the teaching of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), which the Solicitor General cites, and was the basis for the form of verdict in this case. Contrary to the Solicitor General's claim, however, Kaiser never agreed to the form of interrogatories that the trial judge submitted to the jury.

bility that the Court of Appeals might have upheld a verdict had the case not involved price squeeze evidence is irrelevant, for neither the Court of Appeals nor this Court could or can now determine on what evidence the jury's verdict was based.

Nor is there any real basis for concluding that the Court of Appeals would have committed the error the Solicitor General finds "suggested" by its opinion. It is plain that Columbia's price squeeze claim was not, as the Solicitor General's comments might suggest, merely another piece of evidence whose admission the court below might have concluded was harmless error. To the contrary, the Third Circuit devoted its only extensive discussion to the price squeeze allegations, recognizing that it was Columbia's "most serious claim." (Kaiser's Petition for a Writ of Certiorari, Appendix B at A-14.) And notwithstanding the Solicitor General's confusion on the issue, it seems clear that only the alleged price squeeze could possibly be viewed as the cause of Columbia's going out of business—which was the basis of the "going concern" damages it claimed.

In this regard, there can be little doubt that Judges Becker and Adams recognized that the price squeeze claim was crucial to Columbia's judgment or they would hardly have concluded that there should have been rehearing en banc on the issue. Nor is it likely that the remaining members of the court would have failed to follow the authority of *Sunkist* and the Third Circuit's own prior cases.[7]

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[7] *See, e.g., Avins v. White*, 627 F.2d 637, 646 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980), where a jury had rendered a verdict for the plaintiff on a defamation claim that might have been based on any of three allegedly defamatory statements. On appeal, the Third Circuit held that the jury was properly permitted to consider only one set of remarks. Recognizing "the distinct possibility that if we affirm the jury's verdict, we may do so on the basis of non-defamatory statements," the court reversed. *See also Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 967-68 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979); *Ayoub v. Spencer*, 550 F.2d 164, 168 n.7 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977).

In sum, the procedural matters addressed by the Solicitor General provide no basis for declining to review the erroneous decision below.

III. Columbia's Arguments That It Would Be Inequitable To Reverse And Remand Should Be Rejected.

In its Supplemental Brief addressing the Solicitor General's views, Columbia has attempted to twist the equities underlying the grant or denial of certiorari in its favor by inaccurately characterizing the history of this litigation. Contrary to its assertions, it is not Columbia that has been prejudiced by the repeated trials and appeals in this case, but Kaiser, which has been forced to endure years of litigation to defend against Columbia's frivolous claims. Some nine years after the district judge first granted Kaiser's motion for directed verdict, Columbia has been able to show no more than that Kaiser engaged in what the Solicitor General has termed "procompetitive" behavior. (Solicitor General's Brief at 18 n.16.) In addition to the legal expenses involved in litigating this case for twelve years, Kaiser is now faced with a judgment of more than $9 million, rendered in favor of a failing company which, in its best year, earned only slightly more than $50,000 in profits.

Both the jury verdict and the judgment of the Court of Appeals were fatally flawed. After years of litigation, Kaiser seeks only correction of that error and a remand for determination of the real merits of Columbia's claims.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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